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Article III Federal Judges

Edward D. Re

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ARTICLE III FEDERAL JUDGES*

EDWARD D. RE**

I. INTRODUCTION

Our subject is judicial independence, judicial discipline and the impeachment of federal judges appointed "during good behaviour" under Article III of the Constitution. The discussion may also be helpful in understanding the *impeachment process* as established in the Constitution of the United States. It will deal with two complementary values of major significance in the American scheme of government: judicial independence and the accountability of all public officials. The congressional enactment of 1980 discussed below is of great importance because it was designed to improve judicial accountability and ethics, and, at the same time, preserve the independence and autonomy of the federal judiciary in the United States. It will also summarize the law pertaining to the status, tenure and removal of federal judges in the United States, who under Article III of the Constitution hold office for life, or, in the words of the Constitution, "during good behaviour."¹

Judicial independence was meticulously established by the framers of the Constitution and jealously guarded by all concerned with the administration of justice.² Past mechanisms de-

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** Chief Judge Emeritus of the United States Court of International Trade and Distinguished Professor of Law, St. John's University School of Law. He served as Chairman for the American Bar Association's Section of International and Comparative Law; President of the American Society of Comparative Law; and as a member of the Judicial Conference of the United States, its Executive Committee and the Committee on International Judicial Relations. He is the Principal Representative of the International Association of Judges to the United Nations.

¹ See U.S. CONST. art. III, § 1 (stating that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their offices during good behaviour").

² See Hon. Abraham G. Gerges, *Independence Under Siege: Unbridled Criticism of*

signed to protect that independence, however, may have created the appearance of an insulated, privileged branch of government. Quite apart from legal considerations, the presence of such a class of persons, however small or exceptional, is an anachronism in a modern democracy. Comparatively recent congressional efforts to provide accountability for Federal judges, without infringing on the bounds of necessary judicial independence, culminated in the enactment of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.³

Chief Justice Warren E. Burger reminded us that "participation in legislative and executive decisions which affect the judicial system is an absolute obligation of judges just as it is of lawyers."⁴ In the spirit of enlightenment and judicial participation, I should like to discuss the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, along with recent developments that have followed its enactment. This important legislation, which became effective on October 1, 1981, addressed a most difficult and sensitive area of law and government, and should be of interest to everyone concerned with the administration of justice.

II. JUDICIAL INDEPENDENCE

Canon 1 of the Code of Judicial Conduct, "A Judge Should Uphold the Integrity and Independence of the Judiciary," declares: "An independent and honorable judiciary is indispensable to jus-

Judges and Prosecutors, 5 J.L. & POLY 541, 541 (1997) (citing THE FEDERALIST NO. 78 (Alexander Hamilton)) (describing judicial independence as cornerstone of democracy); Laura E. Little, *Loyalty, Gratitude and the Federal Judiciary*, 44 AM. U.L. REV. 699, 711 (1995) (stating that Constitution's diversity jurisdiction provision reflects framers' intent in promoting judicial independence and impartiality); Jerome B. Meites et al., *Justice James D. Heiple: Impeachment and the Assimilation of Judicial Independence*, 29 LOY. U. CHI. L.J. 741, 772 (1948) (stating that framers of U.S. Constitution emphasized need for independent judiciary).

³ See Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (effective Oct. 1, 1981) (amending 28 U.S.C. §§ 331, 332(a), 332(c), 332(d), 371, 372, 604) (revising judicial councils of federal courts and streamlining complaint process pertaining to federal judges); see also Hon. Edward D. Re, *Judicial Independence and Accountability: the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 8 NO. KENTUCKY L. REV. 221, 236-54 (1981) (discussing Act of 1980 and its precursors).

⁴ See Remarks of Chief Justice Warren E. Burger accepting the Fordham-Stein Award (Oct. 25, 1978); see also Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1815 (1998) (stating that despite traditional necessity of insulating judges from political activities, participation in legislative and executive decisions affecting judicial system is absolute obligation of judges).

tice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved.”⁵

The Code stresses the “independence of the judiciary” at the very outset. It is self-evident that, without judicial independence, there can be no principled decision-making. Judicial independence is the element that makes possible the deciding of controversial issues on the basis of merit and principle rather than expediency. It permits resisting the pressures of hysteria and fanaticism. Judicial independence is the ingredient that allows a judge to rise above passion, popular clamor and the politics of the moment. In sum, it may be said that without judicial independence, no judge, however well prepared or qualified by qualities of heart, mind and professional training, can give full effect to the enduring values enshrined in monumental declarations of the fundamental rights of all persons.

Because of its historical vicissitudes, the quest for judicial independence has special meaning to those who reap the liberty and freedom of the common law. It is important to remember that at one time, patents given by the King, allowing English judges to serve, could be revoked at regal whim.⁶ As a result, English judges served *durante bene placito*, that is, at the pleasure of the Crown.

The Stuarts reigned at the pinnacle of notions of absolute monarchy. It is, therefore, not surprising that Roscoe Pound said that “[a]lthough there were many strong judges,” the Stuart judiciary was “a politics-ridden bench . . . which was dependent on doing what the exigencies of royal government demanded.”⁷ With the passage of the Act of Settlement of 1701,⁸ English judges were privileged to serve *quamdiu se bene gesserint*, that is, during good behavior.⁹ By the time war broke out with the

⁵ See CODE OF JUDICIAL CONDUCT Canon 1 (1990).

⁶ See John Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 9-10 (1970) (stating that King gave patents which made Judges serve at pleasure of Crown).

⁷ See ROSCOE POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 38-39 (1957).

⁸ See Act of Settlement, 1701, 12 & 13 Will. 3, ch. 2, Section 3, at 360.

⁹ See Pound, *supra* note 7, at 39 (discussing examples of English judges serving during times of “good behaviour”); see also Steven G. Calabresi & Joan L. Larsen, *One Person One Office: Separation of Powers or Separation of Personell?*, 79 CORNELL L. REV.

colonies, the English judge enjoyed a qualified judicial independence.¹⁰

The American colonists were not as fortunate. The colonial judiciary was forced to serve at the pleasure of the Crown.¹¹ This prompted the signers of the Declaration of Independence to charge as a complaint against King George III that: "He has made Judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries."¹² In a penetrating discussion of the "essence of judicial independence," a learned jurist has written that the "independence of the federal judiciary has its origins in the courts of England, and in their subjugation, first to the will of the Crown, and then to parliament."¹³

As a result of their experience with a dependent judiciary, the framers of the Constitution of the United States carefully dispersed the control of judicial tenure and compensation among the branches of the new government to assure American judicial independence.¹⁴ The power of judicial appointment was conferred upon the President "with the advice and consent of the

1045, 1055 (1994) (discussing passage of Act of Settlement); Sam J. Ervin, *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROB. 108, 111-12 (1970) (discussing Act of Settlement and its provision that judge's commissions are made *quamdiu se bene gesserint*); Feerick, *supra* note 6, at 11 (stating that judges would be salaried and serve during good behaviour); Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 137 (summarizing rules pertaining to selection and tenure of judges in early America).

10 See Julie O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO L.J. 2193, 2198-99 (1998) (discussing general history of impeachment in England); Ziskind, *supra* note 9, at 137 (arguing that impeachment is only way to remove judges).

11 See Ervin, *supra* note 9, at 112; (explaining that tradition in colonial era was for judges to serve at pleasure of Crown); Feerick, *supra* note 6, at 12-13 (discussing how during colonial America, it was made clear to Governors that judicial commissions were issued at pleasure of Crown).

12 See THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

13 See Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 672 (1980) (analyzing origins of judicial independence); Burkley N. Riggs & Tamara D. Westerberg, *Judicial Independence: An Historic Perspective*, 74 DENV. U. L. REV. 337, 338-39 (1997) (discussing origins of judicial independence in America).

14 See Sherrylin A Ifill, *Judging the Judges: Racial Diversity Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 128 (1997) (stating importance of judiciary sufficiently detached from other branches); Michael Edmund O'Neill, *Article III and the Process Due a Connecticut Yankee Before King Arthur's Court*, 76 MARQ. L. REV. 1, 55 (1992) (stating that Colonist's were aware of importance of independent judiciary); John P. Sahl, *Secret Discipline in the Federal Courts - Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 200 (1994) (stating that colonists desired independent judiciary to serve as check on other branches of government).

Senate.”¹⁵ Article III, Section 1, of the Constitution specifically provides that the “Judges, both of the Supreme Court and inferior Courts, shall hold their Offices during good Behaviour.”¹⁶ The House of Representatives and the Senate share the power of judicial removal through the process of impeachment and conviction.¹⁷

A. Meaning of “Good Behavior”

It is settled that federal judges are “civil officers” within the impeachment clause of the Constitution,¹⁸ which provides that “all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.”¹⁹ Tenure was guaranteed “during good behaviour.”²⁰ “Good behaviour,” however, is nowhere defined in the Constitution, nor is the manner for deter-

¹⁵ See U.S. CONST. art. II, § 2 (stating that President shall “with the advice and consent of the Senate . . . appoint . . . judges of the Supreme Court, and all other officers of the United States”); see also Hon. Roger J. Miner, *Advice and Consent in Theory and Practice*, 41 AM. U. L. REV. 1073, 1073 (1992) (stating that pursuant to Article II, § 2, of U.S. Constitution, President shall nominate Federal Judges with advice and consent of Senate).

¹⁶ U.S. CONST. art. III, § 1.

¹⁷ See U.S. CONST. art. I, § 2 (stating that “[t]he Houses of Representatives . . . shall have the sole Power of Impeachment”); U.S. CONST. art. I, § 3 (stating that “[t]he Senate shall have the sole Power to try all Impeachments”); see also Warren S. Grimes, *Hundred Ton Gun Control, Preserving Impeachment as Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1211 (1991) (describing powers of Congress in relation to removal process); Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 714 (1988) (discussing language of impeachment clause in Constitution).

¹⁸ See *Shurtleff v. United States*, 189 U.S. 311, 316 (1903) (holding that federal judges can be removed by U.S. President); *United States v. Isaacs*, 493 F. 2d 1124, 1142 (7th Cir. 1974) (holding that Constitution does not forbid trial of federal judge); see also Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 304, 316-317 (1999) (recognizing that federal judges are civil officers subject to criminal prosecution through impeachment hearings).

¹⁹ See U.S. CONST. art. II, § 4; see also Scott E. Grant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS L. Q. 359, 399 (1997) (stating that federal judges are judicial officers subject to removal under Article III, § 2 of U.S. Constitution).

²⁰ See U.S. CONST. art. III, § 1; see also Frank H. Easterbrook, *Unitary Executive Interpretation*, 15 CARDOZO L. REV. 313, 318 (1993) (discussing Constitution’s protection of Article III judges with lifetime tenure during good behavior); Charles A. Heckerman, *A Jeffersonian Lawyer and Judge in Federalist Connecticut: The Career of Pierpoint Edwards*, 28 CONN. L. REV. 669, 717 (1996) (discussing history of judicial grant of lifetime tenure during good behavior); Michael H. Reed et al., *Subject Matter Jurisdiction, Abstinence and Removal Under the New Federal Bankruptcy Law*, 56 AM. BANKR. L. J. 121, 122 (1982) (discussing Article III judges’ protection of lifetime tenure during good behavior).

mining its breach. Hence, the difficulty of the subject and the conflicting opinions of scholars and judges who draw different inferences from the pertinent documents and lessons of history.²¹

Dean John Feerick, in his study of the constitutional provisions relating to impeachment, has concluded that "[t]he use of the words 'during good behaviour' can be viewed as the framers' way of saying that judges, unlike other public officers, have a lifetime tenure, but like other civil officers, may be impeached.²² To be impeachable, an act need not be "indictable or violate a specific statutory provision."²³ It must, however, fall within either of the following categories: "It must violate some known, established law, be of a grave nature, and involve consequences highly detrimental to the United States. In the alternative, it must involve evil, corrupt, willful, malicious or gross conduct in the discharge of office to the great detriment of the United States."²⁴

Since federal judges appointed under Article III of the Constitution are granted tenure "during good behaviour" and are "civil officers" under the Constitution, it is important to take note of Article II, Section 4, of the Constitution. Article II, Section 4, provides that "[t]he President, Vice President and all civil Offi-

21 See THE FEDERALIST NO. 78, at 503 (A. Hamilton) (sesquicentennial ed. 1938) (stating that standard of "good behaviour" for judges "is certainly one of the most valuable of the modern improvements in the practice of government . . . nothing can contribute so much to [the judiciary's] firmness and independence as permanency in office"); see also Henry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behaviour" for Federal Judges*, 87 MICH. L. REV. 765, 772-773 (1989) (emphasizing that meaning of term is subject to debate); Suzanna Shenf, *Judicial Independence: Playing Politics with the Constitution*, 14 GA. ST. U. L. REV. 795, 797 (1998) (stating that term "good behaviour" is ambiguous).

22 See Feerick, *supra* note 6, at 52 (noting that impeachment cases "have ranged from offenses of mere intemperate behavior to criminality and have involved misconduct both on and off the bench"); Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1993 U. ILL. L. REV. 809, 837 (1993) (analyzing drafting of Impeachment Clause as it relates to Federal Judges); see also *Toth v. Quarles*, 350 U.S. 11, 16 (1955) (holding that judge's life tenure "during good behaviour" is "subject only to removal by impeachment").

23 See Feerick, *supra* note 6, at 53 (noting that in drafting impeachment provisions, framers were concerned with more offenses than merely those which both private citizens and public officials could be both found guilty); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 36 (1989) (stating that impeachable offenses include actions that are criminal as well as violations of oath of office).

24 See Feerick, *supra* note 6, at 55 (stating that "acts which result from error of judgment or omission of duty . . . without the presence of a willful disregard, are not impeachable."); O' Sullivan, *supra* note 10, at 2207 (asserting that impeachment is necessary when judges breach public trust).

cers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”²⁵ It is significant that, apart from treason, neither “good behaviour” nor “high Crimes and Misdemeanors” are defined in the Constitution.

B. Meaning of “High Crimes and Misdemeanors”

To more accurately define the meaning of “high Crimes and Misdemeanors,” it might prove helpful to consider the views of two members of the House Judiciary Committee, who in 1974 had to determine whether the actions and conduct of President Richard Nixon rose to such a level. In an “Op-Ed” piece for the *New York Times*, former Congressmen Rev. Robert F. Drinan and Wayne Owens wrote that, to prevent the impeachment process from becoming a “partisan free for all,” the House Judiciary Committee in 1974, as the “first order of business,” discussed “what the standards should be for impeachment.” Drinan and Owens wrote that the “committee stipulated from the beginning that ‘because impeachment of a President is a grave step for the nation, it is predicated upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the Presidential office.’”²⁶

In a discussion of the attempts to impeach Presidents Andrew Johnson and Richard Nixon, Professor Lawrence H. Tribe stated that, notwithstanding then-Congressman Gerald Ford’s statement that “an impeachable offense is whatever the majority of the House of Representatives considers [it] to be,” the phrase “high crimes and misdemeanors” was intended by the Framers to connote a relatively limited category closely analogous to the ‘great offences’ impeachable in common law England. In addition to treason and bribery, the ‘great offenses’ included misapplication of funds, abuse of official power, encroachment on or contempt of legislative prerogatives and corruption.”²⁷ Professor

²⁵ See U.S. CONST. art. II, § 4.

²⁶ See Robert F. Drinan & Wayne Owens, *An Easy Line to Draw*, N.Y. TIMES, Oct. 1, 1998, at A31 (discussing acceptable standards for impeachment); see also Feerick, *supra* note 6.

²⁷ See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 290-291 (2d ed. 1988); see also Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Im-*

Tribe stated that the House Judiciary Committee's proposal of the Nixon Impeachment Articles confirmed "the view of most commentators" that [a] "showing of criminality is neither necessary nor sufficient for the specification of an impeachable offense."²⁸ Although violation of a criminal statute may not be necessary for impeachment, violation of a minor criminal offense is insufficient to warrant impeachment. The offenses charged must come within the common law tradition that offenses must constitute a serious abuse of official power to justify impeachment.²⁹

A most helpful Report on the subject of "The Law of Presidential Impeachment" states:

[I]n summary . . . the grounds for impeachment are not limited to or synonymous with crimes (indeed, acts constituting a crime may not be sufficient). Rather, we believe that acts that undermine the integrity of government are appropriate grounds, whether or not they happen to constitute offenses under the general criminal law At the heart of the matter is the determination—committed by the Constitution to the sound judgment of the two Houses of Congress—that the officeholder has demonstrated by his actions that he is unfit to continue in the office in question.³⁰

On the impeachment of a President, Professor Tribe concludes:

[A] commitment to principle can better be secured, insofar as any verbal formula can help secure it, by accepting and acting on the proposition that 'Congress may properly impeach and remove a President only for conduct amounting to a gross breach of trust or serious abuse of power, and only if it would be prepared to take the same action against any President who engaged in comparable conduct in similar cir-

peachment, 76 Ky. L.J. 707, 723 (1988) (noting that impeachable offenses are not necessarily limited to crimes).

²⁸ See TRIBE, *supra* note 27, at 293-94.

²⁹ See Gerhardt, *supra* note 23, at 13 (explaining that at Constitutional Convention, delegates agreed that officials will not be immune from prosecution if they commit common law crimes); O'Sullivan, *supra* note 10, at 2218 (stating that Congress looked to common law to determine precedent in impeachment cases).

³⁰ THE COMMITTEE ON FEDERAL LEGISLATION OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK, *THE LAW OF PRESIDENTIAL IMPEACHMENT* 161 (1974).

cumstances.’³¹

This standard or suggestion in effect adopts the view expressed in a Report, submitted on

January 21, 1974, by a distinguished Committee on Federal Legislation of the Association of the Bar of the City of New York. The Report was prepared “in the interest of informing the Bar and the public, and without taking any position on the evidentiary matters involved in the [then] current impeachment controversy”³² pertaining to President Nixon. The view of the Committee was expressed as follows:

We believe the intention of the Framers of the Constitution, the history of the actual use of impeachment and removal, and considerations of sound Policy all strongly support construction of ‘high Crimes and Misdemeanors’ as not limited to offenses under the ordinary criminal law. But considerations of original intention, historical usage, and sound public policy likewise caution against a wholly unrestricted reading of the phrase. The concept of ‘high Crimes and Misdemeanors’ should not be taken to mean anything and everything around which political expediency might momentarily organize a majority of the House and two-thirds of the Senate.³³

The Committee’s conclusion and recommendation to the Congress is expressed as follows:

We submit that Congress may properly impeach and remove a President only for conduct amounting to a gross breach of trust or serious abuse of power, and only if it would be prepared to take the same action against any President who

31 *TRIBE*, *supra* note 27, at 290-291 (citing HOUSE COMM. ON THE JUDICIARY, CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT, 93D CONG., 2D SESS. 522-6 (Comm. Print 1974)) (outlining historical debate on the understanding of “high crimes and misdemeanors” and discussing presidential authority to remove other executive officers).

32 See LAW OF PRESIDENTIAL IMPEACHMENT, *supra* note 30, at 154.

33 *Id.* at 155-156; see also O’Sullivan, *supra* note 10, at 2210 (recounting Constitutional Convention debates revealing Framers’ intent not to limit meaning of “high crimes and misdemeanors” to criminal activity, by examining progression of phrases suggested and rejected).

engaged in comparable conduct in similar circumstances. Although the responsibility for giving content to the constitutional grounds for impeachment is, in our opinion, solely that of Congress, our conclusion is that Congress should exercise these powers subject to a firm sense of constitutional restraint.³⁴

It is also important to note that the authors of the Committee Report concluded that the "standards for impeachment and removal . . . are not 'judicially manageable' in our view."³⁵ Hence, the Committee concluded that "both because the Constitution is explicit and the intent of the Framers plain that the Legislative Branch exclusive of the courts should judge impeachments, and because the standards applicable to the basic issues in an impeachment are not 'judicially manageable,' we believe it would be unconstitutional for the courts to review judgments of impeachment, even if Congress sought to escape its 'sole' responsibility by enacting a statute conferring such jurisdiction on the courts."³⁶

The Report continues:

Our conclusion applies equally to judicial review of the procedures utilized by Congress in impeachment proceedings. In carrying out this unique constitutional function, procedural decisions will inevitably be tied to judgments on the merits. Congress should not be forced by the courts to operate in accordance with rules of procedural due process which have been developed to govern judicial or administrative proceedings.³⁷

34 LAW OF PRESIDENTIAL IMPEACHMENT, *supra* note 30, at 155-156; see also THE FEDERALIST NO. 65, at 423 (Alexander Hamilton) (Mod. Libr. Ed. 1941) (stating that impeachment is for "abuse or violation of some public trust"); Daniel H. Pollitt, *Sex in the Oval Office and Cover-up Under Oath: Impeachable Offense?* 77 N.C. L. REV. 259, 267 (1998) (stating that our founding fathers intended impeachment power to be used only when public's trust was abused or violated).

35 See LAW OF PRESIDENTIAL IMPEACHMENT, *supra* note 30, at 170; see also O'Sullivan, *supra*, note 10, at 2222-23 (explaining that court in *Nixon v. United States* stated that no "judicially manageable" standards exist to test Senate's actions).

36 See LAW OF PRESIDENTIAL IMPEACHMENT, *supra* note 30, at 170.

37 *Id.*; see also *Nixon v. United States*, 506 U.S. 224, 238 (1993) (concluding that word "try" in Impeachment Trial Clause "does not provide an identifiable textual limit on the authority which is committed to the Senate").

The view expressed in the Report, that the impeachment process resides exclusively in the House and the Senate, has been confirmed by recent judicial decisions including Supreme Court cases dealing with the impeachment and conviction of Article III federal judges. These cases, as well as the recommendations of the National Commission on Judicial Discipline and Removal, contained in its Report of August 2, 1993 discussed herein, indicate that the impeachment process is a political one reserved by the Constitution to the House and the Senate. Hence, the claims of Article III federal judges who have sought judicial review of their impeachment and convictions have been held to be non-justiciable political questions.³⁸

C. Cases of Impeachment and Convictions

The American experience with impeachment investigations, impeachments and convictions by the Senate is revealing. There have been fifty-eight documented cases of impeachment of Article III federal judges. Of the fourteen that resulted in trials before the Senate, only seven were convicted and removed from office:³⁹ "Judge Pickering (drunkenness and senility), Judge Humphreys (incitem'ent to revolt and rebellion against the Nation), Judge Archbald (bribery), Judge Ritter (kickbacks and tax evasion), Judge Claiborne (tax evasion), Judge Hastings (conspiracy to solicit a bribe), and Judge Nixon (false statements to a grand jury)."⁴⁰ Pursuant to the last clause of Article I, Section 3, of the Constitution only Judge Humphreys and Judge Archbald were also disqualified from holding "future office of honor, trust or profit under the United States."⁴¹

Two famous impeachment trials in the Senate that did not result in convictions due to a failure to obtain "the Concurrence of two thirds of the Members present," as required by Article III,

³⁸ See discussion in Section V and Conclusion herein.

³⁹ See NATIONAL COMM'N ON JUDICIAL DISCIPLINE AND REMOVAL, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 29-30 (1993). Of these seven Article III federal judges convicted and removed from office, six were district judges and one was a circuit judge. *Id.*

⁴⁰ See *Id.*; see also ELEANORE BUSHNELL, CRIMES, FOLLIES AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 19 (1992) (analyzing impeachment process and questioning types of offenses, whether act must be one committed in official capacity and whether willfulness is necessary in determining impeachability of offenses).

⁴¹ See JUDICIAL DISCIPLINE AND REMOVAL, *supra* note 39, at 30.

Section 3 of the Constitution, are those of President Andrew Johnson and Chief Justice Samuel P. Chase.⁴² President Andrew Johnson was charged with violating the Tenure of Office Act.⁴³ The Tenure of Office Act was long regarded as unconstitutional even before the Supreme Court in 1926 held that it violated the Constitution in *Meyers v. United States*.⁴⁴ In President Andrew Johnson's case, the Senate failed to reach the required two-thirds vote by only one vote. Chief Justice Chase, who was accused of partisan conduct on the bench, was also acquitted.

In perhaps one of the best known modern cases of impeachment investigations, that of President Richard M. Nixon, the impeachment process never concluded because of President Nixon's resignation on August 9, 1974. The resignation of President Nixon was inevitable after his compliance with the Supreme Court decision of *United States v. Nixon*⁴⁵ which disclosed information that, "when added to evidence already accumulated by the House Judiciary Committee, made virtually inevitable the President's impeachment, conviction and removal from office."⁴⁶

D. Punishment for Underlying Misconduct or Crimes

Notwithstanding any doubts that may exist as to the intent of

42 See WILLIAM H. REHNQUIST "GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON, 104-05, 233-35 (1992) (detailing impeachment trials of Justice Samuel P. Chase and President Andrew Johnson); see also Jason J. Vicente, *Impeachment: A Constitutional Primer*, 3 TEX. REV. LAW & POL. 117, 136, 141-43 (1998) (detailing impeachments of Presidents Chase and Johnson).

43 See Tenure of Office Act of March 2, 1867, ch. 154, 14 Stat. 430 (providing that President could not remove Cabinet Member that required confirmation of Senate without consent of Senate).

44 See *Myers v. U.S.*, 272 U.S. 52 (1926) (holding Tenure of Office Act unconstitutional because it violated President's ability to remove executive officers).

45 See *Nixon v. U.S.*, 418 U.S. 683, 707 (1974) (holding that generalized intent to assert executive privilege cannot prevail over fundamental, particularized demand for evidence necessary to criminal trial); see also, Brett M. Kavanaugh, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 GEO. L. J. 2133, 2168 (1998) (concluding that prosecutor's showing of need for evidence does not need to be compelling in order to overcome presumption of presidential privilege, where President wishes to withhold evidence).

46 See TRIBE, *supra* note 27, at 292 (discussing case of President Nixon and giving examples of past presidential impeachment attempts); see also Dean Alfange Jr., *The Supreme Court and the Separation of Powers: a Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 716-77 (1990) (stating that President Nixon's compliance with subpoena provided evidence that proved his active participation in conspiracy to obstruct justice in Watergate case and ultimately led to his resignation); John Batt, *American Legal Populism: A Jurisprudential and Historical Narrative, Including Reflections on Critical Legal Studies*, 22 N. KY. L. REV. 651, 744 (1995) (stating that it was President Nixon's compliance with subpoena order that led to his resignation).

the framers of the Constitution and meaning of the words "good behaviour" and "high Crimes and Misdemeanors," it is clear that impeachment is a *removal* provision and not "punishment" for the underlying behavior, misconduct, crimes or acts that may constitute the ground or grounds for the impeachment. Article I, Section 3, of the Constitution expressly provides that: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."⁴⁷ In addition to this clause, it is noteworthy that Article II, Section 2, expressly provides that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States except in Cases of Impeachment."⁴⁸

Reduction of judicial compensation for the Federal judges was prohibited by the constitution.⁴⁹ An idea borrowed from the English experience, and culminating in the Act of Settlement of 1701,⁵⁰ the control or securing of judicial compensation was seen as a way to insulate the judiciary from the threats to its independence by a hostile legislature.

E. Judicial Immunity

The courts through the doctrine of judicial immunity have also

⁴⁷ See U.S. CONST. art. I, § 3, cl. 7.

⁴⁸ See U.S. CONST. art. II, § 2, cl. 1.

⁴⁹ See U.S. CONST. art. III, § 1 (stating that "[t]he Judges, both of the supreme and inferior Courts, shall . . . receive for their services a compensation, which shall not be diminished during their continuance in office"); see also Vasily A. Vlashin, *Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory: Legal Theory: Political Rights and Freedoms in the Context of American Constitutionalism: A View of a Concerned Soviet Scholar*, 84 NW. U. L. REV. 257, 283 (1989) (noting that judge's salaries "shall not be diminished" was aimed to "insulate them from the caprice of Congress and the President"); Victor Williams, *Third Branch Independence and Integrity Threatened by Political Branch Irresponsibility: Reviewing the Report of the National Commission on Judicial Discipline and Removal*, 5 SETON HALL CONST. L.J. 854, 861 (1995) (noting that inability to reduce judicial compensation was fundamental to guarantee of independent judiciary).

⁵⁰ See Act of Settlement, 12 & 13 Will. 3, c.2, § 3 (1701) "Judges' Commission be made *Quandiu se bene gesserint* [during good behavior], and their Salaries ascertained and established . . ." A statute implementing the Act of Settlement prevented diminution of a judge's salary "so long as the Patents and Commissions of them, or any of them respectively, shall continue and remain in force." 1760, 1 Geo. 3, c. 23, § 3; 1 WILLIAM BLACKSTONE COMMENTARIES *267. Blackstone declared that the two statutes were designed "to maintain both the dignity and independence of the judges." *Id.*

safeguarded judicial independence. In *Bradley v. Fisher*,⁵¹ the Supreme Court affirmed the decision of a lower court which held that a judge was immune from liability for judicial acts. The Court wrote:

[I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one whom might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.⁵²

The Court went on to quote English precedent explaining the purpose of judicial immunity:

[A] series of decisions . . . extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice It is essential in all courts that the judges who are appointed to administer the law, should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear.⁵³

It is significant that the Court added: "[T]his provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences."⁵⁴ The immu-

⁵¹ *Bradley v. Fisher*, 80 U.S. 335, 347 (1871) (emphasizing that judge's immunity from liability is critical to maintenance of independent judiciary); see also *Randall v. Brigham*, 74 U.S. 523, 536 (1868) (noting that judicial officers are not liable for action taken in their capacity as judges).

⁵² See *Bradley*, 80 U.S. at 347.

⁵³ *Id.* at 349-50; accord, *Scott v. Stansfield*, L.R. 3 Ex. 220 (1868) (explaining that judicial immunity was initially created to discourage collateral attacks by disgruntled litigants); see also *Forrester v. White*, 484 U.S. 219, 225 (1987) (explaining that purpose of immunity is to protect judicial process from harassment or intimidation).

⁵⁴ See *Bradley*, 80 U.S. at 349; see also *Ray v. Pierson*, 286 U.S. 547, 554 (1967) (ex-

nity of judges from liability covers all judicial acts, regardless of the motivations of the judges since "[t]he purity of their motives cannot in this way be the subject of judicial inquiry."⁵⁵ The chilling effect of liability for judicial acts would severely hamper judicial independence.

III. JUDICIAL ACCOUNTABILITY

Although judicial independence has been pursued since our nation's infancy, the conflict between that independence and the accountability of judges is obvious. The difficulty stems from the fact that both independence and accountability are values to be cherished and fostered. In decision-making, in general, and the judicial process, in particular, often the choice is not between good and evil. Rather, it becomes necessary to weigh, balance or accommodate competing values or ideals.⁵⁶ It may be added that these values are also related to the autonomy of the judiciary and the separation of powers.

Opponents of judicial discipline legislation assert that federal judges, like all other citizens, are subject to the criminal law of the land. In 1974, the Seventh Circuit in *United States v. Isaacs*⁵⁷ declared that "[p]rotection of tenure [for Federal Judges] is not a license to commit crime," and the Constitution "does not forbid the trial of a federal judge for criminal offenses committed either before or after the assumption of judicial office."⁵⁸ Surely, the judge found guilty of a crime and unwilling to resign, may thereafter be impeached and removed from office. This possibility, however, does not answer the demands of the proponents of legislation intended to eliminate and deter aberrant judicial behavior or misconduct. The demands for accountability reached a level that found support in the judiciary for the condemnation of behavior that may not warrant impeachment.

plaining that fear of retaliation by dissatisfied litigants would impede judge's ability to hand down well-reasoned decisions).

⁵⁵ See *Bradley*, 80 U.S. at 347.

⁵⁶ See *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982) (noting that "[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative"); *Gregoire v. Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949) (noting that "the answer must be found in a balance between the evils inevitable in either alternative").

⁵⁷ See *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974).

⁵⁸ *Id.* at 1142; see also *Feerick*, *supra* note 6, at 56 n. 287.

IV. RECENT PRECURSORS OF THE 1980 ACT

Direct antecedents of the 1980 Judicial Councils Reform and Judicial Conduct and Disability Act⁵⁹ can be traced to 1939, when the judicial councils were created through the Administrative Office Act.⁶⁰ The administrative powers or functions of the councils included:

Assigning judges to congested districts, and to particular types of cases, directing them to assist infirm judges, ordering them to decide cases long held under advisement, requiring a judge to forego his summer vacation in order to clear his congested docket, compelling multi-judge courts to arrange staggered vacations, and setting standards of judicial ethics.⁶¹

The statutory grant of powers to the Judicial Councils was before the Supreme Court in *Chandler v. Judicial Council of the Tenth Circuit*.⁶² In *Chandler*, the Judicial Council, acting under the authority of Section 332, found that Judge Chandler was "unable, or unwilling, to discharge efficiently the duties of his office,"⁶³ and issued an order reassigning his cases, and prohibiting the assignment of future cases. Judge Chandler, a United States District Court judge, challenged the authority of the Council to issue the order, and applied to the Supreme Court for an extraordinary writ. Specifically, the judge contended that the Council "usurped the impeachment power, committed by the Constitution to the Congress exclusively."⁶⁴ The Supreme Court did not entertain the judge's application for an extraordinary

59 See Act of 1980, *supra* note 3.

60 See Administrative Office Act of 1939, ch. 501, 53 Stat. 1223 (codified as amended at 28 U.S.C. § 332 (1976)). The act also provided for the staffing of the Judicial Conference of the United States through the creation of the Administrative Office of the United States Courts. See generally PETER FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 125-26, 379-426 (1973).

61 Peter Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U.CHI. L. REV. 203, 207 (1970); see also, Patrick Donald McCalla, *Judicial Disciplining of Federal Judges is Constitutional*, 62 S. CAL. L. REV. 1263, 1273 (March/May 1989) (noting that Congress wanted Judicial Councils to have broad discretion in preserving court's integrity).

62 See *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970).

63 *Id.* at 77.

64 *Id.* at 82.

writ. Although the application was denied, the various judicial opinions in the case highlight the divergent views on judicial independence and the need for accountability to attain "the effective and expeditious administration of the business of the courts."⁶⁵ In effect, the question presented was whether there was power to discipline a federal judge for conduct that might not have warranted impeachment.

In delivering the Court's opinion, "Judge Chandler had "not made a case for the extraordinary relief of mandamus or prohibition," Chief Justice Burger wrote:

The dissenting view of [the justices in] this case seems to be that the action of the Judicial Council relating to assignment of cases is an impingement on judicial independence. There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business. The question is whether Congress can vest in the Judicial Council power to enforce reasonable standards as to when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine matters. As to these things—and indeed an almost infinite variety of others of an administrative nature—can each judge be an absolute monarch and yet have a complex judicial system function efficiently.⁶⁶

Referring to the many internal rules necessary to manage the courts, the Chief

Justice stated: "But if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse."⁶⁷ In an impassioned dissent, Justice Douglas would have vacated "the orders of the Judicial Council that brand[ed] Judge Chandler as

⁶⁵ See 28 U.S.C. § 332(d) (1976).

⁶⁶ *Chandler*, 398 U.S. at 84-5.

⁶⁷ *Id.* at 85. (noting that internal rules are not usually scrutinized by public but are essential in management of courts).

unfit to sit in incoming cases.”⁶⁸ For Justice Douglas there was no doubt that “[o]nce a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge.”⁶⁹ Specifically, in the view of Justice Douglas: “What the Judicial Council did when it ordered petitioner to ‘take no action whatsoever in any case or proceeding now or hereafter pending in his court was to do what only the Court of Impeachment can do.’”⁷⁰

V. THE ACT OF 1980

Serious efforts to enact judicial discipline legislation culminated in the enactment of the 1980 Act that went into effect in October 1981. This Act introduced a new element into the administrative machinery of the United States federal judiciary. For the first time, it provided for a complaint procedure against an Article III federal judge. This new complaint procedure pertaining to the judicial behavior of a federal judge is found in 28 U.S.C. § 372(c). The statute provides that “any person may complain that a [federal judge] has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.”⁷¹

Supporters of the Act of 1980 stated that the procedure established by the new law, within the existing judicial councils, not only makes an appropriate accommodation, but also provides a proper balance between the values of judicial independence and accountability. Others continue to say that it is an improper intrusion upon judicial independence, and refer to its “chilling” effect. It should be noted that the Act does not apply to justices of the Supreme Court. The House Report sets forth as follows the reasons for this intentional exclusion:

⁶⁸ *Id.* at 141. (Douglas, J., dissenting) (emphasizing that without an amendment to constitution only Congress is authorized to impeach Judges); see also J. SIMON, *INDEPENDENT JOURNEY—THE LIFE OF WILLIAM O. DOUGLAS* 391-411 (1980).

⁶⁹ See *Chandler*, 398 U.S. at 136 (Douglas, J., dissenting) (stating that judicial independence prevents judges from censoring or sanctioning other judges).

⁷⁰ *Id.*; see also in M. PAULSEN, *LEGAL INSTITUTIONS TODAY AND TOMORROW* 274, 285 (1959).

⁷¹ See 28 U.S.C. § 372(c)(1). See generally, Robert W. Kastenmeier and Michael J. Remington, *Judicial Discipline: a Legal Perspective*, 76 KY. L.J. 763, 766 (1988) (noting that 1980 Act was implemented in response to growing number of complaints made against federal judges).

First, high public visibility of Supreme Court Justices makes it more likely that impeachment can and should be used to cure egregious situations. Second, it would be unwise to empower an institution such as the Judicial Conference, which actually is chaired by the Chief Justice of the United States, to sit on cases involving the highest ranking judges in our judicial system.⁷²

A. *Statement of the President*

A summary of the aims of the Act is found in the statement of President Carter on signing S. 1873 into law on October 15, 1980. The President remarked that he was pleased to sign the legislation and stated its purpose as follows:

This legislation creates a mechanism and uniform procedures by which members of the judiciary can respond to allegations of unfitness against Federal judges. It makes a sound accommodation between two essential values—preserving the independence of the Federal judiciary, and making judges, as public servants, accountable under law for their conduct in office.⁷³

Although couched in language of “judicial conduct and disability,” it is beyond question that the legislation was designed to curb *unfitness* as well as “disability” for judicial office. Hence, it is legislation clearly designed to cope with or curb judicial *misconduct* as well as “disability.” The President characterized impeachment as a cumbersome procedure that left valid complaints without remedy. Stating further that “[m]ost States have systems for dealing with unfit judges, and there is a need for a uniform, nationwide system to hear and fairly determine complaints against Federal judges.”⁷⁴

Discussing the goals of judicial independence and accountabil-

⁷² See H.R. REP. NO. 96-1313, at 10 n. 28 (1980).

⁷³ See 16 WEEKLY COMP. OF PRES. DOC. 2239-40 (Oct. 15, 1980) (quoting President Jimmy Carter signing S. 1873 into law); see also S. Res. 96-362, 96th Cong. (1980) (emphasizing that legislation was enacted to achieve desired balance between judicial independence and accountability and to ensure American's confidence in judiciary).

⁷⁴ See WEEKLY COMP. OF PRES. DOC. 2239-40 (Oct. 15, 1980).

ity, the President stated:

Judicial independence—the freedom of judges to interpret and apply the law without favor or fear of retribution—is amply safeguarded by this legislation. The system created by this act is contained entirely within the judicial branch of the Government; only Federal judges are involved in the process. No judge need fear disciplinary proceedings as a result of decisions he or she has rendered, because this possibility is explicitly precluded. Furthermore, the bill assures the judges of fairness and confidentiality.⁷⁵

While the President found that the Act safeguarded judicial independence, he also found that the goal of judicial accountability had been achieved.

[T]he legislation creates uniform, known procedures for dealing with an unfit judge. Citizens can be confident that a complaint filed under this system will receive fair and serious attention throughout the process. For all these reasons new process should increase public confidence in the quality of the Federal judiciary.⁷⁶

It is clear that the President agreed with the collegial system established by the Act.

B. Summary of Procedures

Section 2(c) contains the general grant of authority to the circuit councils to “make all necessary and appropriate orders for the effective administration of justice within its circuit.”⁷⁷ Each council is expressly authorized to hold hearings, take testimony and issue subpoenas. Furthermore, all judicial officers and employees of the circuit “shall promptly carry into effect all orders of the judicial council.”⁷⁸

Section 3 contains the substance of the complaint mechanism

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See Act of 1980, *supra* note 3, at § 2(c).

⁷⁸ *Id.*

established by the Act.⁷⁹ Section 3(c)(1) allows “any person” to complain that a circuit, district, bankruptcy judge or magistrate “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or . . . that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability.”⁸⁰ The complaint must be in writing and filed with the Clerk of the Court of Appeals for the particular circuit.

The Chief Judge can dismiss complaints that do not address conduct prejudicial to the administration of justice or disability. The Chief Judge will also dismiss complaints directly related to the merits of a case, procedural ruling, or frivolous charges.⁸¹ The Chief Judge may also conclude the proceeding if “appropriate corrective action has been taken.”⁸² Fears of vexatious complaints chilling judicial independence would seem unwarranted because the mechanism allows a colleague, a member of the judiciary to dismiss such complaints at the very outset. If the Chief Judge dismisses a complaint, copies of the written order must be sent to the complainant, and the judge who is the subject of the complaint. If the Chief Judge determines that the complaint should be investigated, the Chief Judge must appoint a “special committee to investigate the facts and allegations” of the complaint.⁸³

The judicial council of the circuit shall receive a “comprehensive written report” of the special committee’s investigation and recommendations.⁸⁴ Upon receipt of this report, the judicial council may conduct “any additional investigation which it considers to be necessary.”⁸⁵ Furthermore, the judicial council “shall take such action as is appropriate to assure the effective and ex-

⁷⁹ *Id.* § 3 (stating anyone who has complaint can file with clerk of Court of Appeals at which time clerk will transmit information to Circuit Chief Judge and Judge who is subject of complaint).

⁸⁰ See 28 U.S.C. § 372(c)(1) (1976), as amended by Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035, § 3(c)(1). This legislation supplements 28 U.S.C. § 631(h) (1976) which provides that the judges of a district court may remove a magistrate for “incompetency, misconduct, neglect of duty, or physical or mental disability.”

⁸¹ See 28 U.S.C. § 372(c)(3)(A) (1976).

⁸² *Id.* § 372(c)(3)(B) (1976).

⁸³ *Id.* § 372(c)(4)(A) (1976).

⁸⁴ *Id.* § 372(c)(5).

⁸⁵ *Id.* § 372(c)(6)(B).

pedition administration of the business of the courts.”⁸⁶

The judicial council's choice of action can vary in severity. It may take a variety of actions including, but not limited to, any of the following: certifying disability of a judge,⁸⁷ requesting voluntary retirement,⁸⁸ ordering a temporary freeze on the assignment of cases to the offending judge,⁸⁹ and private⁹⁰ or public censure or reprimand.⁹¹ The council may also order “such other action as it considers appropriate” *except for the statute's absolute prohibition of removal from office of an Article III judge except by the impeachment process*.⁹² Provisions for written notice⁹³ of the council's actions foster accountability and protect the due process rights of the parties.

In addition to the various actions authorized in paragraph (c)(6), the judicial council may refer the complaint and its recommendations to the Judicial Conference of the United States.⁹⁴ In cases where the council determines that a judge has engaged in conduct “which might constitute grounds for impeachment,” the council must refer the matter to the Judicial Conference of the United States.⁹⁵ The Judicial Conference of the United States may use any of the sanctions possessed by the councils and, when necessary, may transmit records to the House of Representatives regarding impeachment.⁹⁶

The special committees of investigation appointed by the Chief Judges, the judicial councils, and the Judicial Conference of the United States, all possess full subpoena powers in conducting their investigations.⁹⁷ Provisions for review, within the prescribed complaint mechanism, assure fairness for all parties. Judges, complainants aggrieved by final orders of a Chief Judge, or a judicial council may petition the judicial council or the judicial Conference of the United States, respectively, for review.

⁸⁶ *Id.*

⁸⁷ *Id.* § 372(c)(6)(B)(ii).

⁸⁸ *Id.* § 372(c)(6)(B)(iii).

⁸⁹ *Id.* § 372(c)(6)(B)(iv).

⁹⁰ *Id.* § 372(c)(6)(B)(v).

⁹¹ *Id.* § 372(c)(6)(B)(vi).

⁹² *Id.* § 372(c)(6)(B)(vii).

⁹³ *Id.* § 372(c)(6)(D).

⁹⁴ *Id.* § 372(c)(7)(A).

⁹⁵ *Id.* § 372(c)(7)(B).

⁹⁶ *Id.* § 372(c)(8).

⁹⁷ *Id.* § 372(c)(9)(A), (B).

Denials of petitions for review are final. The finality of denial safeguards the judge from harassment, and also compels a justly sanctioned judge to abide by the decision.⁹⁸

VI. RECENT DEVELOPMENTS SINCE THE 1980 ACT

Since the enactment of the 1980 Act, three cases involving the impeachment of federal judges have been brought to the Supreme Court. These cases, all occurring within a two-year period, have done much to clarify and reaffirm the law regarding the constitutional status and the trial and conviction of federal judges found guilty of serious crimes. These three high-profile cases also provided the Supreme Court with the opportunity to restate the American law on the tenure, discipline and removal of the Article III judge found guilty of a crime or misconduct, and the impeachment process set forth in the Constitution pursuant to which Article III judges, who hold office "during good behaviour" may be removed from office.

The first case is that of Judge Alcee L. Hastings, a United States District Judge for the Southern District of Florida.⁹⁹ The Report of the National Commission on Judicial Discipline and Removal states the following concerning the case of Judge Hastings:

Judge Alcee Hastings . . . was the first sitting federal judge to be prosecuted for corrupt behavior in office. The Department of Justice believed that he had become involved in a bribery scheme. He was indicted and in February 1982 tried and acquitted.

Subsequently, a special committee of the Eleventh Circuit judicial council conducted an investigation of Hastings's conduct pursuant to the 1980 Act. This investigation eventually resulted in a certification by the Judicial Conference that Hastings's had engaged in conduct that might constitute grounds for impeachment. The House impeached Hastings, and the Senate convicted him and removed him from office. The proceedings were marked by charges of racism and

⁹⁸ *Id.* § 372(c)(10).

⁹⁹ See *Hastings v. United States*, 459 U.S. 1203 (1983).

other prosecutorial misconduct. Hastings remained in office throughout the criminal and impeachment proceedings. Hastings has since been elected to the U.S. House of Representatives.¹⁰⁰

The second case is that of Judge Harry Eugene Claiborne, a United States District Judge in the District Court for the District of Nevada.¹⁰¹ Judge Claiborne, a sitting Article III federal judge who was under federal indictment, applied to the United States Supreme Court to stay criminal proceedings on the ground that a federal sitting judge may not be prosecuted before being removed by impeachment. In denying the application for a stay, Justice Rehnquist stated that the contention of the applicant "that a federal judge may not be indicted and tried for a criminal offense until he is first impeached and convicted by Congress—has been rejected not only by the Court of Appeals in this case but also by the only two other Courts of Appeals to consider the question."¹⁰²

The third case is that of *Walter L. Nixon v. United States*.¹⁰³ Judge Nixon was the former Chief Judge of the United States District Court for the Southern District of Mississippi. After Judge Nixon was convicted of federal crimes and sentenced to prison, the House of Representatives adopted articles of impeachment against him and presented them to the Senate. Following the proceedings, commenced pursuant to Senate Rule XI, which allows a committee of Senators to hear evidence against an impeached individual and to report that evidence to the full Senate,¹⁰⁴ the Senate voted to convict Nixon, and the presiding

100 JUDICIAL DISCIPLINE AND REMOVAL, *supra* note 39.

101 See *Claiborne v. United States*, 465 U.S. 1305 (1984).

102 *Id.* at 1305 (citing *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974) and noting that Court denied certiorari in both cases).

103 506 U.S. 224 (1993).

104 See SENATE IMPEACHMENT RULE XI, *reprinted in* SENATE MANUAL, S. DOC. NO. 101-1, 186 (1989). SENATE RULE XI provides:

In the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all of the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

officer entered judgment removing Judge Nixon from his judgeship. Judge Nixon then commenced suit for a declaratory judgment seeking reinstatement of his judicial salary and privileges, arguing that, because Senate Rule XI prohibits the whole Senate from taking part in the evidentiary hearings, it violates the first sentence of the Constitution's Impeachment Trial Clause, which provides that the "Senate shall have the sole Power to try all Impeachments." The District Court held that his claim was nonjusticiable, i.e., that it involved a political question that could not be resolved by the courts. The Court of Appeals affirmed.¹⁰⁵

In this action Judge Nixon asked the Supreme Court to decide whether "Senate Rule XI which allows a committee of Senators to hear evidence against an impeached individual to report that evidence to the full Senate" violates the Impeachment Trial Clause. That Clause provides that the "Senate shall have the whole Power to try all Impeachments."¹⁰⁶

Writing for the Court, Chief Justice Rehnquist stated that "before we reach the merits of such a claim, we must decide whether it is 'justiciable,' that is whether it is a claim that may be resolved by the courts."¹⁰⁷ Rehnquist added that Judge Nixon:

[W]as convicted by a jury of two counts of making false statements before a federal grand jury and sentenced to prison (citation omitted). The grand jury investigation stemmed from reports that Nixon had accepted a gratuity from a Mississippi businessman in exchange for asking a local district attorney to halt the prosecution of the businessman's son. Because Nixon refused to resign from his office as a United States District Judge, he continued to

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

¹⁰⁵ See *Nixon v. United States*, 506 U.S. 224, 224.

¹⁰⁶ See U.S. CONST. art. I, § 3, cl. 6.

¹⁰⁷ See *Nixon*, 506 U.S. at 226.

collect his judicial salary while serving out his prison sentence.¹⁰⁸

On May 10, 1989, the House of Representatives adopted three articles of impeachment for high crimes and misdemeanors. The first two articles charged Nixon with giving false testimony before the grand jury and the third article charged him with bringing disrepute on the Federal Judiciary.¹⁰⁹ After the House presented the articles to the Senate, the Senate voted to invoke its own Impeachment Rule XI, under which the presiding officer appoints a committee of Senators to "receive evidence and take testimony."¹¹⁰ The Senate committee held four days of hearings, during which 10 witnesses, including Nixon, testified.¹¹¹ Pursuant to Rule XI, the committee presented the full Senate with a complete transcript of the proceeding and a Report stating the uncontested facts and summarizing the evidence on the contested facts.¹¹² Nixon and the House impeachment managers submitted extensive final briefs to the full Senate and delivered arguments from the Senate floor during the three hours set aside for oral argument. Nixon himself gave a personal appeal, and several Senators posed questions directly to both parties.¹¹³ The Senate voted by more than the constitutionally required two-thirds majority to convict Nixon on the first two articles.¹¹⁴ The presiding officer then entered judgment removing Judge Nixon from his office as United States District Judge.

After an examination of Article I, Section 3, of the Constitution, to determine the scope of authority conferred upon the Senate by the Framers of the Constitution regarding impeachment, the Supreme Court decided that the power of impeachment "was reposed in the Senate and nowhere else."¹¹⁵ The Court therefore affirmed the holdings of the District Court and Court of Appeals that Nixon's claim was not justiciable because it involved a po-

¹⁰⁸ *Id.*

¹⁰⁹ See 135 CONG. REC. H1811-04 (May 10, 1989).

¹¹⁰ See Senate Impeachment Rule XI, *supra* note 104.

¹¹¹ See S. REP. NO. 101-164, at 4 (1989).

¹¹² *Id.* at 3-4.

¹¹³ See 135 CONG. REC. S14493-14517 (Nov. 1, 1989).

¹¹⁴ *Id.* at S14635 (Nov. 3, 1989). The vote for conviction on the first article was 89-8, on the second, 78-19. *Id.*

¹¹⁵ See *Nixon v. United States*, 506 U.S. 224, 735.

litical question. The Court based its holding on the text of the clause of the Constitution that provides:

The Senate shall have the sole Power to try all Impeachments. . . When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.¹¹⁶

Chief Justice Rehnquist noted that the first sentence is a grant of authority to the Senate and the word "sole" indicates that this authority is reposed in the Senate and nowhere else. The next two sentences specify requirements to which the Senate proceedings shall conform. The Senate shall be on oath or affirmation and a two thirds vote is required to convict, and whenever the President is tried the Chief Justice shall preside. Hence, the Supreme Court affirmed the holding of the Court of Appeals that Judge Nixon's claim was not justiciable. In summary, Judge Nixon had been removed from office in accordance with and as provided by the applicable provisions of the Constitution.

CONCLUSION

After deliberating for three consecutive days, the United States Senate on October 9, 1986 removed Judge Harry E. Claiborne, a United States District Judge of the United States District Court of Nevada from office. The Senate had last removed a federal judge more than fifty years earlier. Judge Claiborne's removal was only the fifth in the history of the nation. Nevertheless, within two years, two other District Court judges, Alcee L. Hastings and Walter L. Nixon, were also removed from office by the Senate. In the House, these three impeachment proceedings required seventeen days of hearings. In the Senate three committees spent a total of thirty days receiving evidence and testimony, and the full Senate spent a total of ten days acting upon the Article of Impeachment. Records developed by both the House and the Senate in all three cases exceeded 23,000 pages of

¹¹⁶ See U.S. CONST. art. I, § 3, cl. 2.

material.

Many found it especially troublesome that two of the judges had been convicted of felonies, were sentenced to incarceration, had exhausted all available judicial appeals, and yet were still receiving full salaries and benefits until they were finally removed through the impeachment process. Before 1983 no sitting federal judge had ever been prosecuted and convicted of a crime committed while in office. Since then five sitting federal judges have been indicted for serious crimes, and four have been convicted. Indeed, the increase in the number of life-tenured judges was also a cause for apprehension. In 1936 there were 224 life-tenured federal judgeships. In 1989 there were 757. There had been discussion of limiting the number of federal judges, since many believed that the number would exceed 1,000 within a decade, creating the possibility of an unwarranted burden for the Congress to remove life-tenured federal judges by the impeachment process provided by the Constitution.

A variety of proposals were mentioned and introduced seeking to find an alternative to impeachment for removing life-tenured federal judges from office. Of the many suggestions and proposals, an idea first proposed by Senate Majority Leader Robert Dole in 1986 was finally revised by the House Judiciary Committee, passed both Houses, and was ultimately approved by the President on December 1, 1990. As envisioned by the House Judiciary Committee and finally authorized by Public Law 101-650,¹¹⁷ Congress established the National Commission on Judicial Discipline and Removal. Three specific duties assigned to the Commission were first "to investigate and study problems and issues related to the discipline and removal from office of life-tenured federal judges"; second "to evaluate the advisability of proposing alternatives to current arrangements for responding to judicial discipline problems and issues"; and, third, "the Commission was directed to submit to Congress, the Chief Justice, and the President a report of its findings and recommendations."¹¹⁸

After the selection and appointment of the Commissioners by the appointing authorities, the Commission commenced its work

¹¹⁷ See National Commission on Judicial Discipline and Removal Act, Pub. L. No. 101-650, 104 Stat. 5124. (1990).

¹¹⁸ See JUDICIAL DISCIPLINE AND REMOVAL, *supra* note 39, at ii-iv.

on January 30, 1992 and presented its findings and recommendations in its Report approved by the Commission on July 28, 1993. The key findings and recommendations mentioned in this presentation are deserving of the most serious consideration because they represent the views of the most thoughtful and best informed minds in the country who seriously considered the opinions of the most qualified and most experienced persons familiar with the problems related to the appointment, tenure, discipline and removal of federal judges. The key findings and conclusions indicate the views of the Commission and accurately summarize the law of the United States on the subject.

The findings and conclusions set forth the views of the Commission on the constitutional issues presented. The commission concluded that a statute that would provide for the removal from office of Article III Judges by means other than impeachment and conviction would be unconstitutional, as would a statute under which a judge's compensation would be suspended on the basis of a criminal conviction. The following are some of the Commission's specific recommendations:

The Commission recommends retaining the political mechanism of impeachment by the House and trial by the Senate as now provided in the Constitution. The impeachment process is the sole appropriate means for the removal of life-tenured judges.

The Commission recommends against a constitutional amendment under which convicted judges would be removed automatically.

The Commission opposes the suggestion that Congress should be able to determine by statute the way in which federal judges are removed.

The Commission opposes any proposal under which the Supreme Court would participate in the removal of federal judges.

The Commission concludes that the current constitutional standard for impeachment, as interpreted over the years, has been adequate to its purpose and recommends that it

not be amended.¹¹⁹

Notwithstanding the three recent cases of impeachment and conviction discussed above, the Commission concluded that the existing system has worked well and that no constitutional amendment was recommended to effect any drastic change in the existing system.

Although the Commission also concluded that "a permanent National Commission on Judicial Discipline and Removal is not necessary,"¹²⁰ it did recommend "informal meetings of high-level representatives of the three branches of the federal government to promote oversight and understanding of judicial discipline, disability, and impeachment,"¹²¹ and that "the Administrative Office [of the United States Courts] routinely provide the House Committee on the Judiciary with all final orders and accompanying memoranda required by the 1980 Act to be publicly available."¹²² It is clear from the recommendations of the Commission made to the Legislative,¹²³ the Executive¹²⁴ and the Judicial Branch¹²⁵ that the Commission envisaged a close cooperative effort in what may be called an *oversight responsibility* of the relevant officers of the three branches of government that share responsibility in the appointment, discipline and removal of lifetime federal judges.

The recommendations to the Executive Branch are particularly revealing, as are the specific recommendations to the Federal Bureau of Investigation that its "full-field investigations of judicial candidates be as comprehensive as reasonably possible to ensure sound judgments about their integrity and qualifications."¹²⁶ A recommendation addressed to the bar states that "the bar and the federal judiciary increase awareness of and education about the 1980 Act among lawyers, judges, court personnel and members of the public. As a part of this educational effort, it is specifically stated that each circuit council that has not

¹¹⁹ *Id.* at 148.

¹²⁰ *Id.* at 150.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 148-150.

¹²⁴ *Id.* at 150-151.

¹²⁵ *Id.* at 151-155.

¹²⁶ *Id.* at 151.

already done so should publish its rules under the Act in United States Code Annotated, and a reference to the 1980 Act and the circuit council's rules should be included in the local rules of each district court."¹²⁷

To this recommendation, anyone interested in the administration of justice might add that the splendid Report of the National Commission on Judicial Discipline and Removal dated August 2, 1993 be widely distributed and be studied by all judges and lawyers, law teachers and all public officials that have any role in the selection, screening, appointment, disciplining and removal of judges throughout the country. The nation and everyone concerned with the important subject of judicial independence owes a deep debt of gratitude to the Commission whose members devoted so much time and effort in producing a document that preserves all that is good of the existing system, and makes valuable suggestions for its improvement.

¹²⁷ *Id.* at 152.

